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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

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No. 273.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, AND ELIZABETH K. KALANIANAOLE, APPELLANTS,

vs.

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLEES.

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Statement of the Case.

This case comes here on appeal from a decree of the Supreme Court of the Territory of Hawaii (Rec., 43-44) affirming a decree (Rec., 30-35) of the Circuit Court of the First Judicial Circuit of that Territory foreclosing a mortgage on certain real estate in the Island of Oahu, and in favor of the present appellees—Ellen Albertina Polyblank, otherwise Sister Albertina, as trustee for Stella Keomailani Cockett,

and Stella K. Cockett, in her own right as sole beneficiary of the trust—and against the mortgagors and appellants, David Kawananakoa and Jonah Kalanianaole, and their respective wives, Abigail W. Kawananakoa and Elizabeth K. Kalanianaole.

The German Savings and Loan Society, a corporation, as holder of a junior mortgage on the property, was also joined as respondent to the bill and is included in the decree of foreclosure, but, being satisfied therewith, did not appeal from the decree of the lower court.

The trust under which Sister Albertina sues was created by deed of October 19, 1899 (Rec., 7-8), from Stella Keomailani Cockett and James D. Cockett, her husband, conveying the lands involved in this foreclosure and other lands to Sister Albertina, of St. Andrew's Priory, Island of Oahu, upon the following trusts:

> "During the life of Stella Keomailani Cockett, wife of James D. Cockett, of Honolulu, to pay over to her the net rents and profits thereof, or at her election to allow her, the said Stella K. Cockett to occupy and enjoy the said estate, she paying the taxes and all necessary charges and expenses (and at her death to convey the said estate to her heirs-at-law); but the said trustee or any successors in said trust, may in her discretion, at any time upon the request in writing of said Stella Keomailani Cockett, sell and convey the said estate, free from the trusts hereby created, holding the proceeds of such sale upon the same trusts as are herein expressed regarding the estate hereby conveyed, and any purchaser of said estate at any such sale, shall not be answerable for the application of the purchase-money, or for the lack of any written request of sale; but the said trustee, or any successor in said trust may, at any time, in her discretion convey and transfer the estate hereby conveyed, or the proceeds thereof, if sold, to the said Stella K. Cockett and the trust hereby created shall thereby be wholly determined, and the trustee wholly discharged and released therefrom."

By deed dated May 8, 1902 (Rec., 9-10), Sister Albertina, as trustee for Stella K. Cockett under the deed in trust of October 19, 1899, conveyed to the appellees, David Kawananakoa and Jonah Kalanianaole, for a consideration of $11,832, certain lands by metes and bounds held by her under said trust "and containing an area of 316,284 square feet, or 7.26 acres more or less."

Mrs. Cockett and her husband also joined in the deed.

Of the purchase price of $11,832 the grantees, Kawananakoa and Kalanianaole, paid $3,832 in cash (Rec., 25) and gave their promissory note (Rec., 4), due one year after date, and with interest at 7 per cent., for the balance of $8,000. To secure this note Kawananakoa and Kalanianaole, joined by their wives, executed a mortgage of even date—May 8, 1902—with the deed and covering the whole of the premises purchased (Rec., 11-12). This mortgage was duly recorded, on the day of its execution, in the office of the register of conveyances, at Honolulu (Rec., 5, 39).

Thereafter, by deed dated September 10, 1903 (Rec., 17-19), the appellants, Kawananakoa *et ux.* and Kalanianaole *et ux.*, sold and conveyed to Samuel M. Damon, for a consideration of $1,290.70, four separate parcels of land, portions of the mortgaged premises, containing an aggregate of 8,175 square feet, or about 19/100ths of an acre.

By deed dated November 7, 1903, Samuel M. Damon conveyed to the Territory of Hawaii all those portions of the mortgaged premises conveyed to him by the appellants' deed of September 10, 1903, *supra*, (Rec., 15, 27), and such parcels are now held and owned by the Territory of Hawaii "in its political and public capacity" and "are now included in and used as a part of certain of the public streets and highways within the city and district of Honolulu, to wit, of a certain street and highway called by the name of the Pauoa road" (Defendants' Plea, Rec., 15; Amended Answer, Rec., 27).

The principal of the note was not paid on maturity and no interest was paid beyond June 25, 1903 (Rec., 5).

Such, then, was the condition of affairs on September 26, 1904, when Sister Albertina, as trustee for Stella K. Cockett, filed bill to foreclose the mortgage (Rec., 2-7). The appellants David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, and Elizabeth K. Kalanianaole, as makers of the mortgage, are made parties respondent, and also the German Savings and Loan Society, as a junior lienor. The Territory of Hawaii was also joined as respondent, paragraph XIII of the bill (Rec., 6) alleging—

> "That the respondent The Territory of Hawaii has or claims to have some interest or claim upon said above described premises or some portion thereof, as a purchaser, the exact nature of which is unknown to complainant, but the same, whatever it may be, is subsequent to and subject to the lien of complainants' mortgage."

The bill, after setting forth the facts substantially as above stated, prays for a decree foreclosing the mortgage; the sale of the mortgaged premises and application of the proceeds of sale, after payment of costs and attorneys' fees, to the payment of the indebtedness secured; and, in the event that such proceeds are insufficient to discharge the indebtedness secured by the mortgage, prays judgment against David Kawananakoa and Jonah Kalanianaole for the amount of the deficiency.

The bill of complaint was afterwards amended by adding the name of Stella K. Cockett, as sole beneficiary of the trust, as a complainant (Rec., 37).

The appellants, Kawananakoa *et ux.* and Kalanianaole *et ux.*, thereupon interposed a plea to the jurisdiction (Rec., 14-16), in which they set up the fact of the conveyance of a part of the mortgaged premises to Samuel M. Damon by deed of September 10, 1903, and the subsequent conveyance

of the same lands by Damon to the Territory of Hawaii, and that such lands "are now owned by the Territory of Hawaii, in "its political and public capacity, * * * and are now "included in and used as a part of certain of the public "streets and highways within the city and district of Hono- "lulu, to wit, of a certain street and highway commonly "called by the name of Pauoa road."

The plea further alleges (Rec., 15):

> "4. That the interests and equities of all persons concerned in and under the mortgage aforesaid cannot be adjusted and determined by this honorable court, in that it is beyond the power and jurisdiction of this honorable court to make or render such decree in this cause as will or can subject that portion of said mortgaged land and premises which has been so conveyed by these defendants to said Samuel M. Damon, and has been so conveyed by said Samuel M. Damon to said Territory, to sale in satisfaction of the lien of said mortgage, as the same is, in and by said bill of complaint, alleged to exist; and that it is beyond the authority and jurisdiction of this honorable court to subject the portion of said mortgaged land and premises so conveyed as aforesaid. to its proportionate share. or to any share of the lien or incumbrance of said mortgage; and that it is beyond the authority and jurisdiction of this honorable court to decree the delivery of the possession of said portion of said mortgaged land and premises so conveyed as aforesaid, from and out of the possession of said Territory; or (and) of its said executive officer, the superintendent of public works aforesaid.
>
> "5. And these defendants submit that they have a right to insist that the matters alleged and set forth in said bill of complaint shall be determined and adjudicated, (if at all) in and before a court possessing full and ample jurisdiction of all the parties in interest. and full and ample authority and jurisdiction to deal with all and singular the premises mentioned, described and conveyed in and by the mortgage mentioned in said bill of complaint; and

having full and ample authority and jurisdiction to dispose of all and singular the premises so mortgaged, and to subject the same to the lien, (if any) of said mortgage, and to decree and enforce its decree for the sale, and for the delivery of possession of all and singular the land, property, and premises mentioned, described, conveyed and included in and by the mortgage in said bill of complaint mentioned, in the event that a sale of said property or any thereof, shall be ordered and adjudged in and by the final decree herein."

A general demurrer to the bill was filed by the Territory (Supplemental Record, p. 2), but before submission on the plea to the jurisdiction and this demurrer the complainants dismissed their bill as to the Territory (Rec., 23).

The case was then argued and submitted on respondents' plea to the jurisdiction (*supra*), and the same was overruled with leave to answer (Rec., 38), whereupon these appellants noted an exception to such ruling and filed their answer (Rec., 23-29). This answer substantially admits all the essential averments of the bill of complaint, except that it is alleged (pars. 3-7) that the "patches or lois of Nakamakaweuweu"—those portions of the premises covered by the second mortgage to the German Savings and Loan Society—were owned by Kawananakoa and Kalanianaole in fee simple before the deed to them of May 8, 1902, and were not intended to be covered by the mortgage.

The answer further sets up an alleged defect of parties, in that one Adrian M. Keoho, who purchased the right, title, and interest of appellant Jonah Kalanianaole in the mortgaged premises at a sale under execution held January 20, 1905—after the institution of this suit—was not made a respondent (pars. 11 and 12, answer).

The German Savings and Loan Society also filed answer, setting up its second mortgage on a portion of the premises (Rec., 20-22).

Thereupon the court, upon the pleadings and the proof offered (Rec., 39-41), entered a decree of foreclosure (Rec., 30-35), in which it was found (par. 2) that the respondents, David Kawananakoa and Jonah Kalanianaole, were indebted to complainants in the sum of $8,000, principal of the note and mortgage sued upon, and interest thereon at 7 per cent. from June 25, 1903, and that they were personally liable for the whole amount thereof, and also (par. 3) for $44.50 costs; and (par. 10) that there was no mistake or misunderstanding between the parties as to the property covered by the mortgage, and that the same was intended to cover and did cover all the land described therein, including the lois, or patches, of Nakamakweuweu; and the decree directed a sale, first, of the 5.17 acres remaining after the deduction of the portion conveyed to the Territory of Hawaii and the lois, or patches, of Nakamakaweuweu, and if the amount realized was insufficient to satisfy the judgment, then a sale of the lois, or patches, of Nakamakaweuweu, upon which the German Savings and Loan Society held a second mortgage. The decree further—

> "Ordered, adjudged and decreed that if the moneys arising from the sales shall be insufficient to pay the amount so found due complainants as above stated, with interest, costs, and expenses of sale aforesaid, the commissioner specify in his report the amount of such deficiency and balance due to complainants in his said sale, and that on the coming in and filing of said return, the clerk of this court docket a judgment for such balance against the respondents David Kawananakoa and Jonah Kalanianaole and that the respondents David Kawananakoa and Jonah Kalanianaole pay to the said complainants the amount of such deficiency and judgment, with interest thereon at the rate of six per cent. per annum from the date of said last mentioned return and judgment, and that the complainants have execution therefor."

From this decree these appellants appealed (Rec., 42) to the Supreme Court of the Territory, and that court, on October 23, 1905, affirmed the decree of the circuit court, saying in the opinion by Mr. Justice Wilder (Rec., 43):

> "This is an appeal from a decree of foreclosure and sale under a mortgage from D. Kawananakoa and J. Kalanianaole to Sister Albertina, trustee for Stella K. Cockett. The suit was brought by the mortgagee against the mortgagors and their wives, the German Savings & Loan Society, a junior mortgagee of a portion of the mortgaged premises, and the Territory of Hawaii, and later discontinued as to the Territory. After the execution of the mortgage the mortgagors conveyed a portion of the mortgaged premises to S. M. Damon, who, in turn, conveyed it to the Territory. The decree authorized the entry of a deficiency judgment against the mortgagors in case the proceeds from a sale of the mortgaged premises should be found to be insufficient to pay the amount due.
>
> "The first claim of appellants is that the decree should be reversed because a purchaser, subsequent to the mortgage, of a portion of the mortgaged premises was not made a party to the suit. It is clear that, unless joined as a party, the rights of a subsequent purchaser cannot be affected or concluded by the decree. The mortgagors have no reason to complain because their interest in the mortgaged premises is foreclosed without joining the subsequent purchaser of a portion. It follows that the foreclosure is good as far as it goes. See *Childs v. Childs,* 10 O. St., 339; *Landon v. Townshend,* 112 N. Y., 93; 2 *Jones on Mortgages,* sec. 1395; *Kay v. Whittaker,* 44 N. Y., 565; *Merriman v. Hyde,* 2 N. W., 218.
>
> "It is further claimed that no deficiency judgment should be entered against the mortgagors until all of the mortgaged premises are sold. All that the mortgagors can claim is that the mortgagee should foreclose on and have sold all of the mortgaged property that is possible, that is, that she should foreclose all that the law allows her to foreclose, before entering up a deficiency judgment. In this case all of the mortgaged property is to be sold except that part

which is now held by the Territory. The interest of the Territory in that portion cannot be foreclosed and sold without joining the Territory as a party defendant, and that cannot be done (see chapter 129 of the Revised Laws). The mortgagee has done all that she can, and it would be inequitable that she should suffer through no fault of her own, particularly when the mortgagors have received a substantial benefit by reason of the transfer.

"*Clark v. Simmons,* 8 N. Y. Supp., 74, cited in 2 Jones, Mortgages, sec. 1709 B, is in point. In that case it was held that where a mortgage on land partly in New York and partly in another State was foreclosed in New York as to the land therein and that land was sold, plaintiff could have a judgment for a deficiency without foreclosing as to the land in the other State, as the New York courts could not order a sale of that land. The California cases cited by appellants on this question are not in point, as they are controlled by a statute which has no force in this Territory.

"Appellants also claim that the decree, in describing the land to be sold, is erroneous in that it does not follow the description in the mortgage. The circuit judge found, as a matter of fact, against this contention. So far as appears on this appeal, we cannot see that the circuit judge erred, and therefore this objection must be overruled.

"The decree appealed from is affirmed."

ARGUMENT.

The gravamen of appellants' complaint is that the court below erred in holding that a deficiency judgment might be entered against them, although the Territory of Hawaii, the owner, by subsequent purchase of a portion of the mortgaged premises, was not a party to the suit, and although sale of that portion held by the Territory was not provided for in the decree. To support this contention, the following propositions are stated by counsel for appellants in his brief, viz:

> (1) "The owners of the equity of redemption of all parts of the premises covered by a mortgage must be made defendants in a suit in equity to foreclose that mortgage."
>
> (2) "No deficiency judgment should be entered against the mortgagors until all of the mortgaged premises have been sold and the proceeds applied to the payment of the mortgage debt."

As statements of the general rule, the propositions advanced are absolutely correct, but, we submit, they do not apply to the case at bar—

(1) Because the Territory of Hawaii could not be made a party to the suit.

And (2) because, by the conveyance to the Territory, the appellees were deprived of their remedy of foreclosure as to such portion, and their security was in effect diminished *pro tanto*. The decree provides for the sale of all the property included in the mortgage which could be sold, and it was hence proper to provide for judgment for whatever deficiency should remain after the sale of all available security.

I.

The Territory of Hawaii Cannot be Joined as Party Respondent in Suit to Foreclose a Mortgage.

There is no provision of the Hawaiian laws providing for suit against the Territory in such case as this. The only provisions of law relating to suits against the Territory are contained in section 2000 of the Revised Laws of Hawaii, originally enacted as section 1 of chapter 26, Laws 1894. This section reads as follows:

> "The Supreme Court shall have exclusive jurisdiction to hear and determine the following matters, and shall determine all questions of fact involved without the intervention of a jury.
>
> "First. All claims against the Territory founded upon any statute of the Territory; or upon any regulation of an executive department; or upon any contract, expressed or implied, with the Territory, and all claims which may be referred to it by either house of the legislature; provided, however, that no suit shall be maintained, nor shall any process issue against the Territory, based on any contract or any act of any territorial officer which such officer is not authorized to make or do by the laws of this Territory, nor upon any other cause of action than as herein set forth.
>
> "Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Territory against any person making claim against the Territory under the provisions of this chapter."

It will be seen that this section confers a right of action against the Territory in four different classes of cases, within none of which does the cause at bar fall, viz:

(1) Claims founded upon any statute;

(2) Claims founded upon any regulation of an executive department;

(3) Claims founded upon any contract, expressed or implied, with the Territory.

(4) All claims which may be referred to it by either house of the legislature.

It is at once manifest that this suit does not fall within either the first, second, or fourth of these classes, nor is there any contractual relation between the Territory and these appellees which would bring it within the third class. There was no assumption by either Damon or the Territory of the mortgage or any portion thereof.

> "It is universally admitted that, while the land conveyed is still liable for the mortgage debt, the vendee does not, by the mere fact of purchase, render himself personally liable either upon the covenant of his grantor before foreclosure, or for a deficiency after foreclosure. In order to cast upon him any liability, it is necessary to show an assumption by which he has made the debt his own. In other words, the obligation can arise only from contract, and the cases under this head are concerned with the question whether or not such contract of assumption has been made.
>
> * * * * * * *
>
> "In construing the language of deeds conveying mortgaged premises it has been decided that where land is conveyed merely 'subject to' a mortgage the grantee does not undertake, by virtue of such words, to pay the mortgage debt. Such language shows that he merely purchased the equity of redemption."
>
> Am. & Eng. Enc. Law (2d ed.), vol. 20, pp. 986-987.

In this case there was not even a reference to the mortgage in the deed (Rec., 17). Manifestly, then, the purchaser assumed no liability for the mortgage indebtedness, and there was no contract, either express or implied, between the Territory and the mortgagees. Hence, clearly this suit does not come within the third class of cases *supra*, in which the Territory may be sued, and there is no provision of law under

which the Territory could have been joined in suit as party respondent herein.

It is elemental, of course, that the State or sovereign cannot be sued in its own courts without its consent; and this is as applicable to a dependent State or sovereignty as to one which has no suzerain or overlord. The political entity which makes laws and creates tribunals for their enforcement, which creates judicial remedies and legislates as to how, when, and under what conditions rights may be litigated and remedies enforced, manifestly cannot be sued in the courts of its creation except by its own consent and legislative provision. In other case, such political entity would be subordinate to its own creatures.

As said in *Beers vs. State of Arkansas*, 20 How., 527, 529:

> "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."

And again, in *Railroad Company vs. Tennessee*, 101 U. S., 337, 339:

> "The principle is elementary that a State cannot be sued in its own courts without its consent."
>
> See also *Briscoe vs. Kentucky Bank*, 11 Pet., 257.

And when a State grants a right of remedy against itself it may attach whatever limitations or conditions it chooses to the remedy; and under our Federal Constitution if one of

the several States gives a right of action against itself, it may thereafter withdraw its consent to be sued, without impairing the obligation of contracts, within the meaning of the constitutional prohibition.

De Saussure vs. Gaillard, 127 U. S., 216.
Antoni vs. Greenhow, 107 U. S., 769.
Railroad Company vs. Tennessee, 101 U. S., 337.
Beers vs. Arkansas, 20 How., 527.

And this rule is equally applicable to the organized Territories of the United States. As said by the Supreme Court of Wisconsin in *Territory vs. Doty,* 1 Pinney, 396, 405, in holding that the Territory could not be sued without its consent:

> "By virtue of its incorporation, all the powers and functions of a sovereign exist—subject only to the supervision and control of the general government. The officers in all branches of the government of the Territory are entitled to similar rights and privileges, and are subject to similar pains and penalties, to those of a sovereign state. And similar provisions are made for the settlement and adjustment of claims against the Territory, and for the disbursement of territorial funds, to those in existence as a sovereign state. For all necessary purposes of government, Wisconsin is as a sovereignty, and should be entitled to the same immunities. It is a Territory of the United States, and is considered thereby a part of the United States or immediately connected therewith. For these reasons we come to the conclusion that the Territory of Wisconsin cannot be sued in the courts of the Territory in the absence of express authority of law for that purpose."

Again, in *Langford vs. King,* 1 Mont., 33, the Supreme Court of Montana said (p. 38):

> "The reason of the law which declares that no government can be sued without its consent, applies to this territorial government as well as to any other government.

"We hold, therefore, that unless permitted by some law of this Territory or of the General Government, no citizen of this Territory can sue it. There is no law of this Territory or act of Congress permitting it. There is, then, no legal power to enforce territorial contracts. In other words, there is no obligation to territorial contracts. They rest simply upon the good faith of the Territory."

Affirmed in *Fisk vs. Cuthbert,* 2 Mont., 593, 598.

But it is contended by appellants' counsel in his brief (pp. 5-12) that the Territory of Hawaii is not such a body politic as possesses immunity from suit in its own courts. Counsel contends that the Territory of Hawaii is a municipal corporation, and as such liable to suit in like manner with private corporations and individuals, and the parallel is attempted to be drawn between the Territory of Hawaii and the District of Columbia. On analysis, we think this proposition at once appears untenable.

Judge Dillon, in his work on Municipal Corporations (3d ed.), section 18, after quoting Chief Justice Marshall's definition of a corporation in *Dartmouth College vs. Woodward,* 4 Wheat., 636, proceeds to thus define *municipal corporations*:

"SEC. 19. *Municipal corporations* are bodies politic and corporate of the general character above described, established by law to assist in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated.

"SEC. 20. We may, therefore, define a municipal corporation to be the incorporation, by the authority of the government, of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is the distinguishing feature of a municipal corporation proper."

Now it is manifest, we think, that the Territory of Hawaii does not fall within the scope of this definition.

The organic act creating the Territory of Hawaii (31 Stats., 141) enacts:

> "SEC. 2. That the islands acquired by the United States of America under an act of Congress entitled 'Joint resolution to provide for annexing the Hawaiian Islands to the United States,' approved July seventh, eighteen hundred and ninety-eight, shall be known as the Territory of Hawaii.
>
> "SEC. 3. That a territorial government is hereby established over the said Territory, with its capital at Honolulu, on the island of Oahu."

And Section 11 provides:

> "That the style of all process in the territorial courts shall hereafter run in the name of 'The Territory of Hawaii,' and all prosecutions shall be carried on in the name and by the authority of the Territory of Hawaii."

Section 55 provides:

> "That the legislative power of the Territory shall extend to *all* rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable."

And Section 56:

> "That the legislature may create counties and town and city municipalities within the territory of Hawaii and provide for the government thereof."

Section 81 provides:

> "That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in

> force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided."

By its organic act, then, the Territory of Hawaii is not a corporation "exercising subordinate specified powers of legislation and regulation," in the sense that a municipal corporation does; but its legislative power extends "to *all* rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable." It creates, itself, municipal corporations—"counties and town and city municipalities." It establishes its own courts and legislates as to their jurisdiction and procedure. Its laws become effective without approval by Congress.

It is true that it is a body corporate—a corporation in a sense—but it is a *public,* not a *municipal,* corporation.

Judge Dillon says (Mun. Corp., sec. 31):

> "Although not styled such, *each one of the United States,* in its organized political capacity, is in effect a public corporation. Corporations, however, as the term is commonly used, do not include States, but only derivative creations, owing their existence and powers to the State, acting through its legislative department. Like corporations, however, a State, as it can make contracts and suffer wrongs, so it may, for this reason, and without express provision, maintain, in its corporate name, actions to enforce its rights and redress its injuries. But a State is not liable to be sued without its consent, although it is not unusual for States, by special enactment, to authorize suits to be brought against them; but, as the permission is voluntary, they may prescribe the terms, and, unless it impairs the obligation of contracts, may withdraw the consent at pleasure."

As said by Mr. Justice Iredell in *Chisholm vs. Georgia,* 2 Dall., 419, 447:

> "Any body politic, sole or aggregate, whether its power be restricted or transcendent, is in this sense

> a corporation. In this extensive sense, not only each State singly, but even the United States, may without impropriety be termed 'corporations.' "

Since the annexation of the Hawaiian Islands, there is, of course, no longer a supreme government in those islands, save that of the United States. The Territory of Hawaii is a body politic created by Congress, and Congress in the exercise of its supreme power may curtail or rescind its powers.

If the term sovereign be used in its limited and perhaps more correct sense, as the seat of *ultimate* power, the Territory of Hawaii is, of course, not sovereign. If, however, there can be such a thing as a limited and delegated sovereignty—a sovereignty which can be resumed—then, in that sense the Territory of Hawaii may be said to possess it. So long as its present status under the organic act continues, the Territory is supreme within the defined limits. Its legislative enactments need no approval to make them law. Its legislative power extends to *all* rightful subjects of legislation not inconsistent with the Constitution and laws of the United States; its courts and the laws which they administer are its own creations.

But we will not argue as to the true meaning and definition of the term "sovereignty." As said by Mr. Justice Wilson (2 Dall., 456): "On this subject, the errors and the mazes are endless and inexplicable."

The immunity of the Territory from suit save by its consent rests upon a more easily defined basis, *i. e.*, upon the practical and common-sense ground that a body politic which enacts its own laws and creates its own courts, defining and limiting their jurisdiction, is of necessity exempt from the jurisdiction of those courts save by its own consent.

In the very nature of things, the creator is not, save with its own consent, under the dominion of its creature; the power which creates tribunals must of necessity be superior to their jurisdiction. If there were to be any general judicial jurisdiction over the Territory, Congress would naturally

have placed that jurisdiction in the Federal courts; yet section 86 of the Organic Act creating the Federal court of local jurisdiction contains no provision for process against the Territory.

It is significant that in none of the acts creating any of the organized Territories has Congress ever provided for the bringing of suits against such Territories, and there is not a single decision to be found holding that such Territories were suable. On examination of the statutes and codes of the various Territories which have been created since the beginning of our Government, it appears that in almost every case there are provisions barring claims against the Territory unless presented within a specified time, less than the general statute of limitations, and in a specified way. This is clear recognition of the immunity of the Territory from general judicial process.

Counsel for appellants (Brief, p. 11) attempts to draw an analogy between the Territory of Hawaii and the District of Columbia, citing *Barnes vs. District of Columbia,* 91 U. S., 540, and *Metropolitan Railroad Co. vs. District of Columbia,* 132 U. S., 1.

The former case deals with the status of the government of the District of Columbia as created by the act of February 21, 1871 (16 Stats., 419); the latter case with the status of that government as established by the act of June 11, 1878 (20 Stats., 102).

The act of February 21, 1871, *supra* (section 1), enacted:

> "That all that part of the territory of the United States included within the limits of the District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, *by which name is hereby constituted a body corporate for municipal purposes,* and may contract and be contracted with, *sue and be sued, plead and be impleaded,* have a seal, and *exercise all other powers of a municipal corporation* not inconsistent with the Constitution and laws of the United States and the provisions of this act."

Thus, not only was the government of the District of Columbia, by this act, created *"a body corporate for municipal purposes"*—a municipal corporation pure and simple—but it was in terms provided that it might *"be sued"* and *"be impleaded."* The organic act thus expressly providing that the municipal corporation created as the District of Columbia might be sued, there could, of course, be no doubt as to its liability to suit, and it was so ruled by this court in *Barnes vs. District of Columbia,* 91 U. S., 540, and that this liability extended to the acts of its Board of Public Works.

By the act of June 11, 1878 (20 Stats., 102), the government of the District of Columbia was created in its present form. That act in terms provided that the District of Columbia should *"remain and continue a municipal corporation."* All rights of action and suits for and against the District were expressly preserved *in statu quo.* Mr. Justice Bradley, delivering the opinion of the court in *Metropolitan Railroad vs. District of Columbia,* 132 U. S., 1, reviews the various forms of local government in the District of Columbia from 1800 to date, and concludes (p. 7):

> "Under these different changes the administration of the affairs of the District of Columbia and city of Washington has gone on in much the same way, except a change in the depositaries of power, and in the extent and number of powers conferred upon them. Legislative powers have now ceased, and the municipal government is confined to mere administration. The identity of corporate existence is continued, and all actions and suits for and against the District are preserved unaffected by the changes that have occurred.
>
> "In view of these laws, the counsel of the plaintiff contend that the government of the District of Columbia is a department of the United States Government, and that the corporation is a mere name, and not a person in the sense of the law, distinct from the government itself. We cannot assent to this view. It is contrary to the express language of the statutes. That language is that the District shall 'remain and

continue a municipal corporation,' with all rights of action and suits for and against it. If it were a department of the Government, how could it be sued? Can the Treasury Department be sued? or any other department? We are of opinion that the corporate capacity and corporate liabilities of the District of Columbia remain as before, and that its character as a mere municipal corporation has not been changed.

* * * * * * *

"One argument of the plaintiff's counsel in this connection is, that the District of Columbia is a separate State or sovereignty, according to the definition of writers on public law, being a distinct political society.

* * * "It is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State; but the sovereign power of this qualified State is not lodged in the corporation of the District of Columbia, but in the Government of the United States. Its supreme legislative body is Congress. The subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations, or in the District corporation, do not make those bodies sovereign. Crimes committed in the District are not crimes against the District, but against the United States. Therefore, whilst the District may, in a sense, be called a State, it is such in a very qualified sense. No more than this was meant by Chief Justice Taney, when, in the Bank of Alexandria *v.* Dyer, 14 Pet., 141, 146, he spoke of the District of Columbia as being formed, by the acts of Congress, into one separate political community, and of the two counties composing it (Washington and Alexandria) as resembling different counties in the same State; by reason whereof it was held that parties residing in one county could not be said to be 'beyond the seas,' or in a different jurisdiction, in reference to the other county, though the two counties were subject to different laws.

"We are clearly of opinion that the plaintiff is a municipal corporation, having a right to sue and be sued, and subject to the ordinary rules that govern the law of procedure between private persons."

The essential difference is at once apparent between the District of Columbia, expressly created as a municipal corporation, with liability to suit—a municipal government confined to mere administration, with Congress the legislative body, and where crimes committed in the District are not crimes against the District, but against the United States—and the Territory of Hawaii with its autonomous government, making its own laws, establishing its own courts, and where crimes committed are prosecuted in its own name.

This distinction was clearly pointed out by the Supreme Court of Hawaii in the case of *Coffield vs. Territory*, 13 Haw., 478, wherein Chief Justice Frear, for the court, said (p. 479):

> "The general rule is that a state is not liable to be sued except by its consent. Such consent is often given, though it is seldom extended to cases of tort.
>
> * * * * * * *
>
> "This suit, however, is brought against the Territory on the theory that it was created a municipal corporation by Congress and as such was made liable, like other municipal corporations, for torts of the kind in question, and that the statute above referred to was to that extent repealed by the organic act under which the Territory was created.
>
> "In a certain sense, all governments are municipal corporations. In this sense each of the several States and the United States is such a corporation. Yet these, being sovereignties, are not liable to suit in their own courts except by their own consent."

He then refers to *Barnes vs. District of Columbia, supra*, and continues (p. 481):

> "The government of these islands is very different from that which was provided for the District of Columbia under that statute and was formed under very different conditions. It is that of an organized Territory and is even more like that of a State than is the case with other organized Territories. It is a government for a large area distributed over many islands

separated by wide channels, with comparatively infrequent communication between the islands as well as between different parts of each island and with a scattered population. It is largely a continuation of the form of government previously existing here, which certainly was never regarded as in the nature of a municipal corporation proper. The question is one of the intention of Congress. It cannot safely be said that because the government of this Territory possesses this or that feature in common with the government of the District of Columbia, or any other municipal corporation proper, that therefore Congress intended to create such a corporation here with the usual liabilities of such a corporation. The fact that the Territory is in a sense a municipal corporation does not render it liable to suit. That does not render a State liable to suit. The fact that it is a political subdivision does not render it liable."

* * * * * * *

And in *Bush vs. Hawaii*, 13 Haw., 1, the court also holds that the Territory is not suable except by its consent.

Counsel for appellants admits (Brief, p. 11) that the decisions in these cases would have been good law under the monarchy or the republic, but says that they are erroneous as regards the Territory.

But it was expressly provided by section 6 of the organic act of April 23, 1900 (31 Stats., 141, 142)—

> "That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States."

The provisions of section 2000, Revised Laws of Hawaii, providing for suits against the government in certain classes of cases, were first enacted by the legislature of the Provisional Government of Hawaii at the session of 1894-1895. Hawaii was at that time an independent nation, and had, of course, full power to confer or withhold the right of action against

itself. There can be no question as to the validity of the statute when passed; and this statute, being continued in force by section 6 of the Organic Act, *supra*, is now the law of the Territory and limits right of suit against it to the classes of cases therein enumerated. The suggestion (Brief, p. 10) that the statute has been impliedly repealed by the Organic Act is at once negatived by the fact that the laws of Hawaii were carefully examined by Congress before the passage of the Organic Act of April 23, 1900, and section 7 of that act enumerates just which sections of the Civil, Penal, and Session Laws were repealed. Reference thereto will show the large number of acts thus examined and repealed. Plainly, then, it was the intent of Congress that the provisions of existing law relating to suits against the Territory should continue in force. There is no ground on which to argue a repeal by implication. In fact, this statute regulating suits by the Territory was by the act of Congress incorporated into the basic law of the Territory.

Even if the Territory as a subsequent purchaser of a portion of the mortgaged premises came within any of the provisions of section 2000, Revised Laws of Hawaii, the Supreme Court of the Territory could not take original jurisdiction of foreclosure proceedings against appellants. Section 1628, Revised Laws of Hawaii (title XVI, ch. 112), defines the general jurisdiction of the territorial Supreme Court as follows:

> "The Supreme Court shall have appellate jurisdiction to hear and determine all questions of law, or of mixed law and fact, which shall be properly brought before it on exceptions, error or appeal duly perfected from any other court, judge, magistrate or tribunal, according to law, or by reservation of any circuit court or judge; and original jurisdiction in all questions arising under writs of error, certiorari, mandamus, prohibition and injunctions directed to circuit courts, or to circuit judges, or to magistrates, or other judicial tribunals, and returnable before the Supreme Court. The Supreme Court and the several

justices thereof in aid of the appellate jurisdiction of the court shall have power to issue writs of mandamus, certiorari, prohibition and *habeas corpus*, and all other writs necessary or proper to the complete exercise of the appellate jurisdiction of the court, and each of the justices shall have original jurisdiction and power to issue writs of *habeas corpus* and make such writs returnable before himself or the Supreme Court or before any circuit court or any judge thereof" (L. 1892, c. 57, sec. 51).

This section confines the *original* jurisdiction of the Supreme Court to questions "arising under writs of error, certiorari, mandamus, prohibition and injunction directed to circuit courts or to circuit judges, or to magistrates or other judicial tribunals, and returnable before the Supreme Court," and also to *habeas corpus* proceedings. A grant of original jurisdiction is exclusive as to all cases not therein enumerated (*Marbury vs. Madison*, 1 Cr., 137, 173).

But original jurisdiction of suits to foreclose mortages is confined to the circuit judges at chambers by section 1648, Revised Laws of Hawaii, which provides that—

> "The judges of the several circuit courts shall have power at chambers within their respective jurisdictions, but subject to appeal to the circuit and supreme courts, according to law, as follows:
> "First. To hear and determine all matters in equity." * * *
>
> *Carter vs. Gear*, 197 U. S., 348.

And section 1834, Revised Laws of Hawaii, provides that—

> "The several circuit judges may hear and determine in equity, all cases hereinafter mentioned, when the parties have not a plain, adequate and complete remedy at the common law, that is to say:
> "Suits for the redemption of mortgages or to foreclose the same." * * *

Thus original jurisdiction to foreclose mortgages is vested in the circuit judges, and the Supreme Court of the Territory

can exercise only an appellate jurisdiction. So, if the Territory of Hawaii could properly be made a party, the action against the Territory would necessarily have to be brought in the Supreme Court, for no other court would have jurisdiction over it. But if the action were brought in the Supreme Court, that court could acquire no original jurisdiction over the mortgagors, because the Supreme Court is not vested with original jurisdiction in the foreclosure of mortgages, that power being vested in the circuit judges; while if the action were commenced before the circuit judge, who had jurisdiction over the mortgagors, but not over the Territory, the circuit judge could exercise no jurisdiction over the Territory. It will readily be seen that if it is necessary to make the Territory of Hawaii a party to this suit, the appellees would be without remedy, because if the suit were commenced before the circuit judge, it could be objected, as it was in this case by these appellants' plea to the jurisdiction, that the circuit judge had no jurisdiction over the Territory, and therefore all of the parties were not before that court; and likewise if the suit were commenced in the Supreme Court, then the objection could be raised that the original jurisdiction over the parties other than the Territory was vested in the circuit judge and not in the Supreme Court.

Before these appellees dismissed their bill of complaint against the Territory (Rec., 23) appellants set up in their plea to the jurisdiction (Rec., 15)—

> "That it is beyond the power and jurisdiction of this honorable court to make or render such decree in this cause as will or can subject that portion of said mortgaged land and premises which has been so conveyed by these defendants to said Samuel M. Damon, and has been so conveyed by said Samuel M. Damon to said Territory, to sale in satisfaction of the lien of said mortgage, as the same is, in and by said bill of complaint, alleged to exist; and that it is beyond the authority and jurisdiction of this honorable court to subject the portion of said mortgaged land and premises so conveyed as aforesaid, to its proportionate share, or to any share of the lien or incum-

brance of said mortgage; and that it is beyond the authority and jurisdiction of this honorable court to decree the delivery of the possession of said portion of said mortgaged land and premises so conveyed as aforesaid, from and out of the possession of said Territory; or of its said executive officer, the superintendent of public works aforesaid."

And when the suit was dismissed as to the Territory, appellants urged the objection in their amended answer that the court could not proceed to a valid decree, because necessary parties—*i. e.*, the Territory—were not before the court (Rec., 28). In the first instance they object because the Territory *was* made a party, and in the second instance they object because the Territory was *not* made a party. Now these positions are essentially inconsistent and contradictory. If, as now contended, the Territory of Hawaii is a mere municipal corporation, subject to suit in all cases in which a private individual or corporation could be sued, then it would be suable before the circuit judge at chambers and "subject to the ordinary rules that govern the law of procedure between private persons."

Metropolitan Railroad vs. District of Columbia, 132 U. S., 1, 9.

The Territory must either be exempt from suit except by its own consent, and have power to say in what cases and before what tribunal—i. e., its Supreme Court—it may be impleaded, or else it is suable in the same court and in the same way in which a private person would be sued. There is no other alternative. The limitation of jurisdiction in suits against the Territory to the Supreme Court necessarily implies immunity from suit save by consent; otherwise the status of the Territory as a municipal corporation is exactly the same, as regards liability to suit, as that of a private person, and the Territory could be sued in any court having jurisdiction over private individuals in similar causes and in the same way.

II.

The Territory not being suable, it necessarily follows that the entire available security was covered by suit and decree, and deficiency judgment after sale of all security which could be reached is proper.

Appellants by their own act have placed a portion of the mortgaged security beyond reach of the appellees. The mortgagees were in nowise parties to the conveyance of this portion of the mortgaged property. It was made without their permission or consent. Yet appellants urgently contend that, even under these circumstances, they are entitled to have the entire mortgaged premises sold before deficiency judgment can be entered against them.

As a general proposition, a mortgagee is entitled to the entire mortgage debt as security for his loan, but in the case at bar the appellants have by their own act conveyed a portion of the mortgaged premises to another, who in turn conveyed it to the Territory. The appellants have thus deprived these appellees of their right to the entire security. They have received a valuable consideration therefor and now attempt to take advantage of their own wrong. They have just as effectually destroyed a portion of this security as if they had destroyed a portion of the security of a chattel mortgage or removed it out of the jurisdiction. The action of the appellants in this cause is substantially the same in matter of principle, because they have to all intents and purposes destroyed that portion of the security which was conveyed to the Territory. As a further illustration of the principle contended for, we call the attention of this Court to the case of *Clark vs. Simmons,* 8 N. Y. Supp., p. 74, cited in 2 Jones on Mortgages, 6th ed., sec. 1709b. In this case it was held that where a mortgage on land partly in New

York and partly in another State was foreclosed in New York as to the land therein and that land was sold, plaintiff could have a judgment for a deficiency without foreclosing as to the land in the other State, because the New York courts could have no jurisdiction as to the land in such other State. This is practically the situation in the case at bar. It is just the same as if part of the mortgaged land was in the Territory of Hawaii and part of it in the State of California, so far as the jurisdiction of the territorial courts is concerned, because the courts of the Territory could exercise no jurisdiction over the Territory of Hawaii in the case at bar.

It is said in appellants' Brief (pp. 12-13) that they "are not responsible for the misfortune, if misfortune there be, of the mortgagee. They did not convey to the Territory, but to a private individual, who, at a subsequent date, conveyed to the Territory." We say that they are directly responsible for this result. The present status of this portion of the mortgaged land is directly the result of their deed, even though the conveyance was made to the Territory through the intervention of a third party—Damon. The total aggregate area of the parcels sold to the Territory, and which are excluded from the operation of the decree, is 8,175 square feet, or a little less than 19/100 of an acre (Rec., 18-19). For this land appellants have received $1,290.70, its full value (Rec., 17). The strip sold is now part of Pauoa road, a street in the city of Honolulu (Rec., 15).

The total area of the two remaining portions of the mortgaged property, and which are covered by the decree of sale, is 7.12 acres (Rec., 32, 35).

"He who seeks equity must do equity." In the case at bar we are treated to the novel spectacle of one coming into a court of equity and seeking to take advantage of his own wrong. The appellants have, as pointed out above, by their own act put it beyond the power of the appellees to exhaust

the entire security and have likewise received a valuable consideration therefor. When the appellants conveyed a portion of the premises to Damon they received a substantial consideration for the transfer, and now they not only seek to retain the purchase price paid them by Damon—$1,290.70—but in addition thereto seek to obtain the benefits from a sale of this portion of the property to further reduce the loan.

III.

The decree properly provided for a deficiency judgment in the event that the proceeds of sale were insufficient to satisfy the indebtedness.

Equity Rule No. 92 governs the procedure in this case. It provides that—

> "In suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any of the courts of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money."

In respect to the provision for deficiency judgment, the decree is similar in terms to that which was approved by this court in *Shepherd vs. Pepper*, 133 U. S., 626, 643, which provided that, if the net proceeds of the sale applicable to the claims of Pepper should prove insufficient to discharge them, he should recover from Shepherd whatever amount might remain due of the claims so decreed to be due by Shepherd to Pepper after the application thereto of the net proceeds of sale, and should have execution therefor as at law.

See also *Hayden vs. Snow*, 9 Biss., 511.

IV.

There is no necessity of making a purchaser subsequent to commencement of suit a party to the proceedings.

One of the objections raised in the court below was that Keoho, the purchaser of Jonah Kalanianaole's interest in the mortgaged premises at the sale under execution, held January 20, 1905, and subsequent to the filing of the bill of complaint herein, was not brought in as a respondent. We understand that this contention has now been abandoned.

It suffices to say, as to this, that Keoho, who purchased at the execution sale, was not a judgment creditor; had no interest whatsoever in the mortgaged premises at the date of commencement of this suit; took with full notice of the foreclosure proceedings, and took whatever interest he acquired *pendente lite*.

There is in Hawaii no statutory provision requiring the filing of a *lis pendens* notice. By section 1 of the Revised Laws of Hawaii (1905), ch. 57, sec. 5, Laws of 1892, "The "common law of England, as ascertained by English and "American decisions, is declared to be the common law of "the Territory of Hawaii." Hence, in the absence of any *lis pendens* statute, the common-law rule applies, that one who acquires any interest in property *pendente lite* takes subject to notice and is bound by the judgment or decree.

> "A purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice; and he will accordingly be bound by the judgment or decree in the suit."
>
> Story, Eq. Jur. (13th ed.), sec. 405, and cases cited.
>
> 2 Jones on Mortgages (6th ed.), sec. 1411.
>
> Wade on Notice, secs. 337-348.
>
> Enc. Pl. & Pr., vol. 9, p. 339, and cases cited.

As said by this court in *Tilton vs. Cofield*, 93 U. S., 163, 168:

> "The law is, that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset."

And again, in *Mellen vs. Moline Iron Works*, 131 U. S., 352, it was held (p. 371):

> "Purchasers of property involved in a pending suit may be admitted as parties, in the discretion of the court; but they cannot demand, as of absolute right, to be made parties, nor can they complain if they are compelled to abide by whatever decree the court may render, within the limits of its power, in respect to the interest their vendor had in the property purchased by them *pendente lite*."

So in *Lacassagne vs. Chapuis*, 144 U. S., 119, 125, it was said:

> "It is well settled, in regard to land, that, when a suit is pending in regard to it, a person who purchases under the defendant *pendente lite* is subject to the operation of a writ of possession if one is finally issued on a judgment in the suit."

To the same effect, see also—

Walden vs. Bodley, 9 How., 34, 49.

Secombe vs. Steele, 20 How., 94, 105.

Terrell vs. Allison, 21 Wall., 289.

Eyster vs. Gaff, 91 U. S., 521, 524.

County of Warren vs. Marcy, 97 U. S., 96, 105.

Whiteside vs. Haselton, 110 U. S., 296, 301.

Union Trust Co. vs. Southern Navigation Co., 130 U. S., 565, 570.

Hollins vs. Brierfield Coal & Iron Co., 150 U. S., 371, 386.

And in *Stout vs. Lye*, 103 U. S., 66, 69, this rule was also applied to the case of a judgment creditor whose interest is acquired *pendente lite*.

Of course, in any event, these appellants would have no ground of objection in the non-joinder of Keoho. Even if Keoho were a necessary or proper party to the cause, which he clearly is not, appellants could suffer no possible injury by his nonjoinder, and hence could make no objection.

In conclusion, we submit that the mortgagee has done all she could do, so far as the foreclosure of this mortgage is concerned, and it would be highly inequitable to defeat her remedy on account of appellants' fault, for which she was in no wise responsible. For the reason stated, the decree should be affirmed.

Respectfully submitted,

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